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No. 02-1421

# In The Supreme Court of the United States

HARVEY AND DORIS MADISON,
CHARLES AND ELENA D'AUTREMONT,
and HARRISON SAUNDERS,

*Petitioners,*

v.

PATRICK J. GRAHAM, Director, Montana Department of Fish, Wildlife, and Parks; STAN MEYER, DAVID SIMPSON, CHARLES DECKER, DARLYNE DASCHER, and TIM MULLIGAN, Commissioners, Montana Fish, Wildlife and Parks Commission; MONTANA COALITION FOR STREAM ACCESS; MONTANA WILDLIFE FEDERATION; MONTANA CHAPTER OF TROUT UNLIMITED; and FISHING OUTFITTERS ASSOCIATION OF MONTANA,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY BRIEF OF PETITIONERS

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## REPLY BRIEF OF PETITIONERS

## I. RESPONDENTS' CHARACTERIZATION OF THE BACKGROUND PRINCIPLES OF LAW IS INACCURATE.

### A. The Montana Supreme Court Addressed Only State Law In The *Galt* Decision.

Montana's passage of the Stream Access Law was a reaction to the Montana Supreme Court's decisions in *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984) and *Montana Coalition for Stream Access v. Hildreth*, 684 P.2d 1088 (Mont. 1984); that is, it was an attempt by the Montana Legislature to make the "public trust doctrine" of the Montana Constitution applicable to the private property beneath and adjacent to non-navigable waters.

In *Galt v. Montana Dept. of Fish, Wildlife & Parks*, 731 P.2d 912, 916 (Mont. 1987), the Montana Supreme Court held that, with the exception of a few minor provisions, the Montana Stream Access Law "accords with the Montana Constitution and the opinions of this Court."[1] In that holding, the Montana Supreme Court discussed only state law, ignoring the plethora of opinions of this Court and the opinions of the federal circuits regarding the Fifth and Fourteenth Amendment protections afforded private property. Moreover, although the landowners asserted

[1] The State now admits that the Stream Access Law "clearly authorizes a permanent physical occupation by the general public" of Montana Landowners' private property and that "[t]hrough the Stream Access law," the Montana Legislature "exercised its power to take" and "condemn[ed]" private property for public use. State's Response, at 3, 7-8.

federal constitutional claims, the Montana Supreme Court declined to address them.[2]

### B. The "Public Trust Doctrine" Does Not Extend To Private Property Underlying And Riparian To Non-navigable Streams.

Under federal law, the "public trust doctrine" does not extend to public use of private property underlying state-owned waters. The public trust doctrine provides only that the navigable waters of a state and the land beneath those waters, that is, "property in which the public has an interest," are "held in trust for the people of the state."[3] *Illinois Central R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892). However, the public trust doctrine does not apply to "land riparian to *nonnavigable* streams;" in fact, the use of "the adjacent riverbed" is reserved to the "owners" thereof as a result of the conveyance of land by the United States and is not a part of the public trust. *Montana v. United States*, 450 U.S. 544, 551 (1981) (emphasis in original).[4]

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[2] *Galt, et al. v. Montana Dept. of Fish, Wildlife & Parks*, 749 P.2d 1089, 1090 (Mont. 1988) ("*Galt II*") makes clear that the landowners in *Galt I* had alleged federal constitutional violations.

[3] The historic test for navigability, which defines those waters over which a state has control, is navigability-in-fact or navigability for the purposes of commerce. *Illinois Central*, 146 U.S. at 436 (holding that the public trust doctrine is "founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment").

[4] Although the Desert Lands Act specifically reserved to the states even non-navigable "water of all lakes, rivers, and other sources of water supply," to be held in the public trust, the purpose of that reservation was to ensure that the waters would remain "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes."

(Continued on following page)

Accordingly, prior to the enactment of the Montana Stream Access Law, Montana law recognized that the State has no interest in the lands beneath and adjacent to non-navigable streams. "The owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream." Mont. Code Ann. § 70-16-201. Similarly, Mont. Code Ann. § 70-1-202 provides, "The state is the owner of . . . all land below the water of a navigable lake or stream." In fact, even with regard to navigable streams, Montana set its own boundary at the low-water mark, that is, Montana claims only the land consistently beneath navigable water. Mont. Code Ann. § 70-16-201. It is this "strip of land between the high-water and the low-water mark" on navigable rivers to which the Montana Supreme Court referred as part of the public trust in *Gibson v. Kelly*, 39 P. 517, 519 (Mont. 1895). The public "rights of navigation and fishery" referenced in that case accordingly applied only to navigable waters.

"Although the States may commit public trust waterways to uses other than transportation, such as fishing or land reclamation, this exercise of sovereign discretion does not enlarge the scope of the public trust." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 488 (1988) (Justice O'Connor, with whom Justices Stevens and Scalia joined, dissenting). Accordingly, "[e]ven the majority does not claim that the public trust extends to every waterway that can be used for fishing or for land reclamation." *Id.* "Only

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*California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935).

waterways that are part of a [historically] navigable body of water belong to the public trust." *Id.* at 491.[5]

## II. THE DECISION BY THE NINTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THIS COURT, INCLUDING ITS LATEST ON THE PROTECTION AFFORDED PROPERTY BY THE DUE PROCESS CLAUSE.

In the Petition for *Writ of Certiorari*, Montana Landowners demonstrated that the decision of the Ninth Circuit is in conflict with decisions of this Court regarding the constitutional protection afforded a person's property by the Due Process Clause. Petition, at 7-11. Montana Landowners' position was reaffirmed when, the day after the Petition was filed in this case, this Court ruled in *City of Cuyahoga Falls, Ohio v. Buckeye Comm. Hope Found.*, ___ U.S. ___, 123 S.Ct. 1389 (March 25, 2003). In that opinion, Justice O'Connor, joined by six Justices, addressed the merits of the plaintiffs' Due Process Clause claim by assuming that plaintiffs had been denied a property interest. *Id.* at 1396. Thus, this Court reaffirmed its long held view, a view rejected by the Ninth Circuit, that a person's property is protected by Due Process Clause.

This Court should grant the Petition to resolve this conflict.

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[5] See, *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197-98 (1987); *Montana v. United States*, 450 U.S. 544, 551 (1981); *Utah v. United States*, 403 U.S. 9, 10 (1971); *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Oklahoma v. Texas*, 258 U.S. 574, 583 (1922).

## III. RESOLUTION OF THE UNDISPUTED SPLIT IN THE CIRCUITS WOULD AFFECT MONTANA LANDOWNERS' CLAIMS.

The State admits that there is "confusion" in the Circuits regarding the relationship between the protections afforded private property under the Takings Clause of the Fifth Amendment and under the Due Process Clause of the Fourteenth Amendment. State's Response, at 9. Intervenors admit that there are "differences" between the Ninth Circuit's approach and the approach of other Circuits on this issue. Intervenors' Response, at 12. Furthermore, Intervenors acknowledge that "[n]umerous" Circuits "blur the distinction between takings and substantive due process" in the context of governmental interference with private property. Intervenors' Response, at 9. Nonetheless, the State and Intervenors assert erroneously that resolution of this "confusion" and these "differences" would not affect Montana Landowners' claims.

### A. Exhaustion Requirements Are Not Applicable Because Montana Landowners Seek Injunctive Relief And Not Damages.

Montana argues that Montana Landowners' "failure to exhaust potential state remedies" imposes a barrier to Montana Landowners' claims such that a resolution by this Court of the conflicts set forth in the Petition would not "alter the outcome of the underlying claim." State's Response, at 14. To the contrary, the exhaustion requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985), are inapplicable to Due Process Clause claims.

The Fifth Amendment "proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194.

Therefore, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County*, 473 U.S. at 195. However, because Montana Landowners seek injunctive relief, and not just compensation, there are no "potential State remedies" for them to "exhaust." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989) (*rev'd on other grounds*).[6] Just compensation would not remedy their injuries; rather, they seek to invalidate the wrongful governmental action. *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363 (Fed. Cir. 1998).

For this reason, some Circuits, including the Ninth Circuit, have recognized that exhaustion requirements do not apply to Due Process Clause claims. "[T]he second ripeness prong of *Williamson County* (requiring exhaustion of state procedures for obtaining compensation)" is "inapplicable to [substantive due process] claims." *Sinaloa Lake*, 882 F.2d at 1407. The Seventh Circuit, relying on *Williamson County*, held that exhaustion of state inverse condemnation procedures was not a prerequisite to assertion of a Due Process Clause claim because the state remedies would not address "plaintiffs' right to have the zoning ordinance invalidated." *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 242 n. 3

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[6] Although the Ninth Circuit has overruled *Sinaloa* "to the extent that *Sinaloa* stands for the proposition that a plaintiff may bring a substantive due process claim whenever his other claims are unsuccessful," *Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996), the *Sinaloa* holding, that exhaustion of state remedies is unnecessary when the plaintiff asserts that the government's action is void *ab initio*, remains.

(1st Cir. 1990); *see also*, *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1447 (9th Cir. 1986) ("the existence of postdeprivation state remedies does not bar a substantive due process claim under [42 U.S.C.] Sec. 1983"); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1574 n. 8 (11th Cir. 1989) (holding second prong of *Williamson County* ripeness test not applicable in substantive due process context).

Moreover, in *Montgomery v. Carter County, Tenn.*, 226 F.3d 758, 766-767 (6th Cir. 2000), upon which Intervenors rely, Intervenors' Response, at 14, the Sixth Circuit acknowledged that a claim alleging that the governmental interference is unconstitutional "regardless of whether just compensation is paid," that is, a claim not seeking just compensation as a remedy, is not subject to exhaustion requirements and is ripe for review. Rather, exhaustion requirements apply only to the extent that the plaintiff is seeking compensation or damages. *Id.* at 767, 769-770.[7] Similarly, in *Signature Properties Intern., Ltd. Partnership v. City of Edmond*, 310 F.3d 1258, 1260 (10th Cir. 2002), and *Sandy Creek Investors, Ltd. v. City of Jonestown*, ___ F.3d ___, 2003 WL 1469455 (5th Cir. March 24, 2003), upon which the State relies, State's Response, at 14, the plaintiffs also sought just compensation or damages, while Montana Landowners seek only injunctive relief.[8]

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[7] Although the Sixth Circuit held that the plaintiff's substantive due process claim was subject to the *Williamson County* exhaustion requirements, *Montgomery* is distinguishable from this case because the plaintiff there also sought compensation or damages, while Montana Landowners only seek injunctive relief. *Montgomery*, 226 F.3d at 767, 769-770.

[8] In *Sandy Creek*, the Fifth Circuit held that "[a]lthough substantive due process claims alleging deprivations of property are not necessarily subsumed under the Takings Clause," Sandy Creek's

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Because Montana Landowners' Due Process Clause claims are not barred by the failure to exhaust state remedies, resolution by this Court of the undisputed split in the Circuits regarding the protection afforded property by the Due Process Clause would affect Montana Landowners' claims. This Court should grant the Petition.

### B. Other Circuits Would Allow Montana Landowners To Assert A Due Process Clause Claim On The Facts Of This Case.

The State and Intervenors attempted to distinguish this case from those cases of other Circuits that recognize Due Process Clause claims in the property context. State's Response, at 10-13; Intervenors' Response, at 12-17. For example, Intervenors attempted to distinguish *Del-Rio Drilling*, in which the Federal Circuit specifically recognized multiple protections, including the protection afforded by the Due Process Clause, against governmental interference with private property, merely because the Federal Circuit did not use the term "substantive due process." Intervenors' Response, at 16. Furthermore, Intervenors mischaracterize *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997), arguing that the Eleventh Circuit held there is "no separate cause of action under the Due Process Clause." Intervenors' Response, at 17. In fact, the Eleventh Circuit specifically recognized both a Due Process Clause claim, based on "arbitrary and capricious conduct," and a Takings Clause claim, for want of "just compensation." *Lake Jackson*, 121

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complaint was framed only as a takings claim. *Sandy Creek*, 2003 WL 1469455.

F.3d at 612. What the Eleventh Circuit rejected was a third, hybrid "substantive due process takings" cause of action. *Id.*[9]

The State's and Intervenors' attempts to distinguish the other cases upon which Montana Landowners rely also fail because Due Process Clause claims in the context of governmental interference with private property remain viable in the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Eleventh, District of Columbia, and Federal Circuits. *South County Sand & Gravel Co., Inc. v. Town of South Kingstown*, 160 F.3d 834, 836 (1st Cir. 1998); *Sameric Corp. v. City of Philadelphia*, 142 F.3d 582, 590 (3rd Cir. 1998); *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 170-171 (4th Cir. 1991); *John Corp. v. City of Houston*, 214 F.3d 573, 583 (5th Cir. 2000); *Montgomery*, 226 F.3d at 768-769; *Daniels v. Area Plan. Comm'n of Allen County*, 306 F.3d 445, 458 n. 14 (7th Cir. 2002); *Iowa Coal Min. Co. v. Monroe County, Iowa*, 257 F.3d 846, 853 (8th Cir. 2001); *Tri County Indus., Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) ("the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government imposition"); *Del-Rio Drilling*, 146 F.3d at 1363; *Lake Jackson*, 121 F.3d at 612. Furthermore, the First, Third, Fourth, Eighth, Eleventh, and District of Columbia Circuits have addressed a Due Process Clause claim on the merits in the land use context. *Smithfield*, 907 F.2d at 243-246; *Sameric Corp.*, 142 F.3d

[9] The State failed to address *Del-Rio Drilling* and *Lake Jackson*, two cases upon which Montana Landowners rely in establishing the conflict among the Circuits on this issue.

at 590-596; *Esposito*, 939 F.2d at 170-171; *Iowa Coal*, 257 F.3d at 853; *Lake Jackson*, 121 F.3d at 614. Clearly, Montana Landowners' claim that their property is afforded protection by the Due Process Clause would not be barred in these Circuits as it is in the Ninth Circuit.

Because Montana Landowners' Due Process Clause claim is barred in the Ninth Circuit, but would not be barred in ten other Circuits, resolution of this split in the Circuits would "alter the outcome of [Montana Landowners'] claim[s]." See, State's Response, at 14. Therefore, this case is a proper vehicle for this Court to resolve this split in the Circuits on this important issue.

This Court should grant the Petition.

## CONCLUSION

For all of the above reasons, this Court should grant this Petition.

Respectfully submitted,

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